TAY CHOO FOO

v.

HARRISONS HOLDINGS (M) BHD

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI JC
[SUIT NO: D9-22-1344-2000]
8 MARCH 2001

CIVIL PROCEDURE: *Pleadings - Striking out writ and statement of claim - Writ not dated - Statement of claim not signed - Whether mere irregularities curable by O. 2 r. 1 Rules of the High Court 1980*

CIVIL PROCEDURE: *Striking out - Grounds for - Duplicity of proceedings - Actions arose based on same subject matter*

This was an appeal by the plaintiff/appellant against the decision of the learned SAR allowing the defendant/respondent's application to strike out the plaintiff's concurrent writ and statement of claim.

In the defendant's application to strike out the plaintiff's writ and statement of claim, the defendant raised three grounds: (i) the plaintiff's writ was not dated; (ii) the statement of claim was not signed and was not dated by the plaintiff's solicitor; and (iii) the plaintiff's action before this court was a duplicity of proceedings and therefore an abuse of the process of the court because the issues in this case had been raised in another case filed earlier in another court and still pending (the "D3 suit").

Held:

[1] The writ which was served on the defendant must be dated as required under O. 6 r. 5(4) Rules of the High Court 1980 ('RHC'). The defendant had a right to know whether the writ served by the plaintiff's was still valid or had expired.

[2] It is mandatory for a statement of claim to be signed either by the plaintiff if he sues in person or by his solicitors. Failure to do so will adversely affect the authenticity of the document and thus prejudice the defendant in preparing his defence.

[3] The effect of non-compliance of both the requirements was serious and fundamental and thus could not be treated as a mere irregularity for the purpose of O. 2 r. 1 RHC. This was not a proper case for the court to exercise its power under O. 2 r. 1 RHC as submitted by the plaintiff.

[4] The plaintiff should not be allowed to claim the dividends in this court where the shares upon which the dividends were derived were being contested in another court. There should not be two different courts adjudicating upon the same subject matter.

[Appeal dismissed.]

Case(s) referred to:
Capital Insurance Bhd v. Kassim Mohd Ali [2000] 1 CLJ 269 ***(refd)***
Dato' Wong Gek Meng v. Pathmanathan Myraganam [1998] 1 CLJ 625 ***(refd)***
Hunter v. Chief Constable of the West Midlands Police & Ors [1982] AC 529 ***(refd)***
Kuah Kok Kim v. Chong Lee Leong Seng Co (Pte) Ltd [1991] 1 SLR 122 ***(refd)***
Mohamed Habibullah Mahmood v. Faridah Dato' Talib [1993] 1 CLJ 264 ***(refd)***
Oh Ah Goh v. Kuan Koh Lan & Anor [1966] 2 MLJ 153 ***(refd)***
Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong [1996] 3 CLJ 321 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 2 r. 1, O. 6 rr. 5(4), 6(1), O. 18 rr. 5, 6(5), 19(1)(d)

For the plaintiff/appellant - Joseph Yeo; M/s Joseph Yeo
For the defendant/respondent - KB Ong (George Shek); M/s Lee, Perara & Tan

Reported by Yow Ting Fong

JUDGMENT

Ramly Ali JC:

Introduction

This is an appeal by the plaintiff/appellant to the judge-in-chambers (encl. 16) against the decision of the learned SAR given on 24 November 2000 whereby the learned SAR had allowed the defendant/respondent's application (in encl.6) to strike out the plaintiff's concurrent writ and statement of claim, pursuant to O. 18 r. 19(1)(d) of the Rules of the High Court (RHC) 1980 and under the inherent jurisdiction of the court.

In the defendant's application to strike out the plaintiff's concurrent writ and statement of claim, the defendant has raised three (3) grounds as follows:

i. the plaintiff's concurrents writ was not dated, thus in breach of O. 6 r. 5(4) RHC,

ii. the statement of claim served on the defendant was not signed nor dated by the plaintiff's solicitor, thus in breach of O. 18 r. 5 RHC; and

iii. the plaintiff's action before this court is a duplicity of proceedings and therefore is an abuse of process of court because the issues in this case have been raised in another case ie, Kuala Lumpur High Court Civil Suit No: D3-22-4404-98 filed earlier in another court and still pending (hereinafter referred to as the "D3's suit").

Plaintiff's Claim

The plaintiff claimed to be the registered owner of 1,200,000 ordinary shares in the defendant. On 28 October 1998 the defendant declared an interim net dividend of 10% amounting to RM329,803 payable to the plaintiff under a warrant bearing No: 98/5. On 18 December 1998, the defendant further declared under warrant No 98/50 an 11% dividend amounting to RM362,983.52 in respect of the same shares.

The administrator of the estate of Tunku Mansur bin Tunku Yaakob have made a claim in Kuala Lumpur High Court Suit No: D3-22-4404-98 (D3's suit) against the plaintiff alleging that the plaintiff has not paid for the said shares and that the estate is the rightful owner thereof. In the said D3's suit the plaintiff gave an undertaking not to dispose the said shares until the date of full trial ("sehingga tarikh perbicaraan penuh tindakan") and for the dividend under warrant No: 98/5 to be deposited in an interest bearing account. The defendant had not released the dividends under warrant No: 98/5 or warrant No: 98/50 to the plaintiff. Thus, on 20 July 2000 the plaintiff filed a writ of summon in this court against the defendant for an order that the defendant to pay the plaintiff a sum of RM692,586.72 (being the total amounts of the dividends *vide* Warrant No: 98/5 and 98/50 together with interests and costs).

Later, the plaintiff served a concurrent writ of summon together with a statement of claim on the defendant. As a matter of fact, the said concurrent writ of summon was not dated; and the statement of claim was not signed and not dated by the plaintiff's solicitors. Thus on 3 October 2000, the defendant filed in a summon-in-chambers (encl. 6) to strike out the plaintiff concurrent writ of summon and the statement of claim on the mentioned above grounds.

Findings Of The Court

Undated Concurrent Writ

The defendant submitted that being undated, the said concurrent writ was in breach of O. 6 r. 5(4) RHC. The defendant would not know whether the concurrent writ served on the defendant is still valid or has expired. The plaintiff's counsel on the other hand, submitted that the irregularity is curable under O. 2 r. 1 RHC which should be applied liberally by the court. Order 6 r. 5(4) RHC reads:

(4) A Concurrent Writ must be marked by the Registrar with the word "Concurrent" and he shall sign and date the day of issue of the Concurrent Writ."

The concurrent writ which was served on the defendant must be dated as required under O. 6 r. 5(4) RHC. The rules used the word "must". In *Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong* [1996] 3 CLJ 321 Siti Norma Yaakob JCA has clearly stated:

> The word "must" as opposed to "may" is used in the rule, and we interpret that to mean as implying a peremptory mandate as opposed to a mere direction or discretion as the word "may" implies. We equate the meaning of the word "must" as that given to the word "shall", and for that reason the choice of the word "must" in the rule does not create the existence of any discretion or enpowers the court to exercise such discretion.

The defendant has a right to know whether the said concurrent writ served by the plaintiff was still valid or has expired. This will enable the defendant to prepare for its defence if the writ was still valid when served on the defendant. If the writ has expired, then the defendant may have a different line of defence altogether. Order 6 r. 6(1) RHC provides that for the purpose of service, a concurrent writ is valid in the first instance for the period of validity of the original writ which is unexpired at the date of issue of the concurrent writ. Before the amendment to the RHC which came into effect in September 2000, an original writ is valid in the first instance for 12 months, beginning with the date of its issue. So, failure to state the date of issue of the concurrent writ will obviously prejudice the defendant in preparing for its line of defence to the plaintiff's claim.

Unsigned And Undated Statement Of Claim

The defendant argued that the statement of claim was in breach of O. 18 r. 6 (5) RHC because it was not signed by the plaintiff's solicitor and not dated. The defendant claimed that the defendant would not know if the statement of claim is one which has been filed in court. The plaintiff's counsel again submitted that the irregularity was not serious and thus can be cured under O. 2 r. 1 RHC. Order 18 r. 6(5) RHC reads:

(5) Every pleading of a party must be signed by the party's solicitor or by the party, if he sues or defends in person.

As a matter of fact, the said statement of claim was not dated and not signed at all by anybody. The column for signature by "solicitors of the plaintiff" at p. 3 was left blank. At the bottom of the same page it is stated "this statement of claim is filed by Messrs. Joseph Yeo, solicitors for the plaintiff ...". Clearly in this case the said solicitors were acting on behalf of the plaintiff in filing the said statement of defence.

Again, applying the same principle laid down by Siti Norma Yaakob JCA, in *Perbadanan Nasional Sdn. Bhd. v. Pua Lai Ong (supra)*, I am of the view that it is mandatory for the statement of claim to be signed either by the plaintiff if he sues in person or by the solicitors (as in this case). Failure to do so will adversely affect the authenticity of the document and thus will prejudice the defendant in preparing for defence. In *Oh Ah Goh v. Kuan Koh Lan & Anor* [1966] 2 MLJ 153, it was held that as the statement of claim delivered to the defendant had not been signed by the plaintiff's solicitors, it was not a statement of claim within the meaning of the Rules of the Supreme Court and therefore the statement of claim and service thereof must be set aside. At p. 154, Mac Intyre J, held that:

> Therefore, as far as a pleading is concerned it is mandatory that it should be signed by a solicitor, if one is retained by a party.

Are They Curable Under Order 2 Rule 1 RHC

I have stated earlier that the requirements under O. 6 r. 5(4) and O. 18 r. 6(5) RHC are mandatory. Failure to comply with both the requirements would prejudice the defendant's preparation for proper defence. I am of the opinion that the effect of non-compliance of both the requirements is serious and fundamental and thus cannot be treated as a mere irregularity for the purpose of O. 2 r. 1 RHC.

The need to strictly adhere to the forms and rules especially in the RHC has been stressed by the court from time to time. Litigants and solicitors should, by now, get the necessary message from those decided cases. In this context, I fully agree with Abdul Malik Ishak J, in *Dato' Wong Gek Meng v. Pathmanathan a/l Mylraganam* [1998] 1 CLJ 625 when he said:

> In my judgment, strict and dutiful adherence to forms and rules especially to the RHC will, in the long run, ensure an efficient bar and with it, hopefully, a speedy and efficient administration of justice. Objections to technicalities must be viewed *prima facie* as non-compliance with the rules and the defaulters must pay dearly for it. It is obsolete not to adopt the old-fashioned attitude that the rules of the RHC are intended to facilitate and not impede the administration of justice. On the contrary, the administration of justice would be curtailed if the rules embodied in the RHC are not religiously followed. With the advent

> of the Multimedia Super Corridor, lawyers cannot afford to adopt a lackadaisical attitude nor can they wring their hands and say that the courts would show mercy to them. As a code of procedure, the RHC should be strictly followed to the letter.

In support of the above view, I would like to cite the passage by Mokhtar Sidin JCA in *Capital Insurance Bhd. v. Kassim Mohd. Ali* [2000] 1 CLJ 269, where he said:

> In our view the Rules and Practice Directions made by this Court are to be obeyed and not to be broken. We would like to stress here that parties to an appeal must adhere and comply strictly to those Rules and Directions. Of late we found that there were numerous instances where parties had not adhered or complied to those Rules and Directions and we want to make it clear that they do so at their own risk.

The power under O. 2 r. 1 RHC must be exercised sparingly. It should not be used to give litigants or solicitors a "carte blanche cover" to overlook all forms of irregularities. A mere omission or oversight on part of litigants or solicitors should not be an excuse to invoke those powers. In *Kuah Kok Kim v. Chong Lee Leong Seng Co. (Pte.) Ltd.* [1991] 1 SLR 122, the Singapore Court of Appeal applied a strict approach when it held:

> Notwithstanding the very wide powers given to the court to remedy non-compliance with the rules ... there may be failure or non-compliance with the rule which is so fundamental or serious that the Court ought not to exercise its discretion under rule 1 to remedy it.

On the above authorities, I find that this is not a proper case for the court to exercise its power under O. 2 r. 1 RHC as submitted by the plaintiff.

Duplicity Of Proceedings And An Abuse Of Process

The third ground raised by the defendant to strike out the plaintiff's claim is that the plaintiff's action before this court is a duplicity of proceedings and therefore is an abuse of process of court because the issues in this present case have been raised in another case *vide* Kuala Lumpur High Court Civil Suit No: D3-22-4404-98 (D3's suit) filed earlier in a different court and still pending.

The plaintiff argued that there is no duplicity of proceedings. The plaintiff submitted the parties and the issues in that D3's suit are different from that of in the present case.

The relevant writ of summons and statement of claim in the D3's suit are exhibited as "LKC3" in encl. 7. From the pleadings, the plaintiff in our present case is the first defendant in the D3's suit. The defendant in our present case is the second defendant in the D3's suit. The plaintiffs in the D3's suit are the administrators of the estate of Tunku Mansor bin Tunku Yaakob. At paras. 16 and 25(a) of the statement of claim in the D3's suit, it is quite clear that the subject matter of the D3's suit is the same 1,200,000 shares, wherein the plaintiffs in that case are praying for an order, *inter alia*, that they are the beneficial owners of the **said 1,200,000 shares together with all dividends resulting from the said 1,200,000 shares**. In our present case, the statement of claim (encl. 4, exh. "LKC2" specifically in paras. 4 and 9 thereto), the plaintiff is claiming for the dividends arising from the same 1,200,000 shares also. The plaintiff's claim in the D3's suit include the dividends claimed in this case also. If the ownership of the same 1,200,000 shares has already been challenged in another High Court filed earlier and the dispute is still pending, how can the plaintiff in our present case who is at the same time the first defendant in the D3's suit, file this action before this court claiming the benefits (the dividends) arising from the same shares? I do not think this is a proper course of action to be taken by the plaintiff in this action. Dividends do not form a separate and distinct claim. They arose from the same shares. There cannot be a situation where the shares are being contested in one court and *status quo* is being maintained in that court and yet the dividends are being claimed in another court, as what has happened now. If this is allowed to happen, then there can be cases where a third suit may be filed in another court claiming for example, the bonus shares etc. This is clearly duplicity of proceedings and abuse of process of court. The issues in the D3's suit have a bearing in our present case. If the D3 court eventually found that the said shares belong to the plaintiff's (in that case), then the dividends should rightly belong to them too.

In *Mohamed Habibullah bin Mahmood v. Faridah bte Dato' Talib* [1993] 1 CLJ 264, Mohamed Azmi SCJ ruled that:

> Once the parties have submitted themselves to the jurisdiction of the Syariah Court, and once the Syariah Court has taken cognisance of the matrimonial cause on the ground of the husband's misconduct, it would in my view be an abuse of process under para (d) of Order 18 rule 19 of the RHC for Faridah to go to the High Court and complain over the same misconduct.

Even though the above decision relates to the jurisdiction of a Syariah Court, but I am of the view that the principle applicable in that case pertaining to the application of O. 18 r. 19 RHC does apply to our present situation. On abuse of process of court, Lord Diplock in *Hunter v. Chief Constable of the West Midlands Police & Ors* [1982] AC 529: [1981] 3 All ER 727, at p. 536 had this to say:

> My Lords, this is a case of an abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disallow the word discretion) to exercise this salutary power.

The above principle was applied by Mohamed Azmi SCJ in *Mohamed Habibullah*'s case *(supra)* where he further said:

> Applying the above principle, it is difficult to imagine how the administration of justice can be served if the parties are allowed to abuse the process of the court by hopping from one jurisdiction to another over the same subject matter.

Applying the above principle, I am also of the view and find that the plaintiff (in our present case) should not be allowed to claim for the dividends in this court where the shares upon which the dividends were derived are being contested in another court filed earlier; and also where the undertaking has also been given (by the plaintiff in this case) in the D3's suit. There should not be two different courts adjudicating upon the same subject matter.

Undertaking In The D3's Suit

The issue relating to the undertaking by the first defendant in the D3's suit (who is the plaintiff in our present case) was also raised during submissions by both parties. In the D3's suit, the plaintiff (in our present case) had given an undertaking in writing, not to dispose the said shares until the trial date and for the dividend under warrant No: 98/5 to be deposited in an interest bearing account (copy of the undertaking is as exh. "LKC4", encl. 7). The plaintiff alleged that the undertaking has lapsed or that he has been released from the undertaking as his undertaking was until trial date which was in May 1999. The defendant, on the other hand claimed that, no where in the undertaking states that it is to last until May 1999 only; it is only the plaintiff's own interpretation. The defendant also claimed that the plaintiff by his own undertaking given in the D3 court had agreed to maintain *status quo* until full trial of the D3's suit and therefore, the filing of our present case claiming for the dividends is clearly contradictory to the said undertaking. I have no hesitation in agreeing with the defendant in this issue. The relevant phrase in the said undertaking reads:

> Defendan I dengan ini mengakujanji tidak akan melupuskan syer-syer yang terlibat di dalam tindakan ini sehingga tarikh bicara penuh tindakan ini DAN tidak akan mengambil dividen yang telah diisytiharkan di dalam waran bernombor 98/5 di dalam masa yang sama.

It is clear from the above provisions that the expiry date of the undertaking is "sehingga tarikh bicara penuh tindakan". There is no mention that the date is in May 1999. "Bicara Penuh" refers to the completion of the full hearing. It may be postponed from one date to another. Thus the undertaking is valid until the D3's suit is disposed off after full hearing.

In any event, the issue of the undertaking does not affect the findings I have made earlier ie, that there is a duplicity of proceedings and an abuse of the process of the court. In other words, the issue of the said undertaking is not relevant at this stage of the proceeding. Whether the said undertaking is still valid or has lapsed, will not change the findings that I have made earlier. The fact remains that there is another case (the D3's suit) which had been filed earlier involving the plaintiff and the defendant (in this case) and involving the same subject matter and the same issues which is still pending. Even though the said undertaking has lapsed, as alleged by the plaintiff, the D3's suit is still pending. The issue of dividends which the plaintiff intends to claim is related and to be determined in the D3's suit, not in this court.

Decision

Based on the above considerations, the court is satisfied that there is no merit in the plaintiff's appeal. Thus the plaintiff's appeal *vide* encl. 16 be dismissed with costs. The decision of the learned SAR made on 24 November 2000 is confirmed.